IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1836

COOPERS & LYBRAND,
Petitioner,

v.

CECIL LIVESAY and DOROTHY LIVESAY, for Themselves and on Behalf of All Others Similarly Situated,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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Petitioner Coopers & Lybrand prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this action, which reversed an order of the district court and ruled that this action should proceed as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.[1]

OPINIONS BELOW

The opinion and order of the United States District Court for the Eastern District of Missouri are not officially reported but are reproduced as Appendix A hereto. The opinion and

[1] This is a companion case to the Petition filed on behalf of Punta Gorda Isles, *et al.*, against the same respondents.

judgment of the United States Court of Appeals for the Eighth Circuit, reported at 550 F.2d 1106, are set forth as Appendix B. The order of the Court of Appeals denying rehearing and rehearing en banc is annexed as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on March 4, 1977. Petitioner's timely petition for rehearing was denied on March 28, 1977. This petition is being filed within 90 days of March 28, 1977.

The jurisdiction of this Court is founded on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is an order of a district court determining that an action cannot be maintained as a class action appealable pursuant to 28 U.S.C. § 1291 under the "death-knell" doctrine?

2. Did the Court of Appeals exceed the proper scope of its authority in ordering the district court to re-certify this case as a class action?

STATUTE INVOLVED

This case involves 28 U.S.C. § 1291, which provides in pertinent part: "The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ."

STATEMENT OF THE CASE

The complaint in this action charged petitioner and others with various violations of the Securities Act of 1933, the Securities Exchange Act of 1934 and Rule 10b-5 of the S.E.C.

The claim asserted on behalf of the two named respondents amounted to approximately $2,650 plus interest. The complaint also purported to state claims on behalf of a class amounting to several million dollars. The jurisdiction of the district court was predicated upon 15 U.S.C. §§ 77v and 78aa.

At the original hearing on respondents' motion for class-action certification, the evidence showed that the class included, *inter alia*, one member with a claim of approximately $500,000 and another one who had supposedly been damaged to the extent of $140,000. On June 9, 1975, the district court entered an order certifying the case as a class action under Rule 23(c). However, on September 1, 1976, in response to a motion filed by petitioner and in accordance with Rule 23(c)(1), the district court, having questioned respondents' adequacy to represent the class on several other occasions, ruled that the action could no longer be maintained as a class action. Respondents, disdaining the interlocutory appeal procedure of 28 U.S.C. § 1292(b), appealed to the Eighth Circuit under 28 U.S.C. § 1291, which applies only to "final orders." In response to petitioner's motion to dismiss the appeal, the Court of Appeals found as a matter of fact that respondents' individual claim was so miniscule that they would not continue to prosecute the case unless the district court's order was reversed. On the basis of that finding, the Court of Appeals concluded that the order was a "final order" under the "death-knell" theory and therefore appealable.

Despite the fact that Rule 23(c)(1) provides that any class action determination "may be conditional and may be altered or amended before the decision on the merits," the Court of Appeals then proceeded to hold that the district court had abused its discretion in de-certifying the class action. It reversed the district court's ruling and held, in effect, that the class should be re-certified.[2]

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[2] Respondents' alternative Petition for a Writ of Mandamus (8th Cir. No. 76-1906) was dismissed, and respondents have not pursued that matter in this Court.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The Eighth Circuit Has Adopted the "Death-Knell" Doctrine That Has Been Rejected by the Third and Seventh Circuits, and Has Applied That Doctrine in a Way That Is Inconsistent With Decisions of the Fifth and Ninth Circuits.

In deciding that it had jurisdiction to hear the appeal in this case, the Eighth Circuit adopted and applied the so-called "death-knell" theory. This doctrine, as applied here, permits an appeal under § 1291 from a district court's order denying class-action status if the Court of Appeals finds that the named plaintiffs will not continue the litigation on an individual basis. The death-knell exception to the finality requirement of § 1291 has been a source of controversy and has produced a divergence of judicial opinion. It has been unqualifiedly rejected by the Third and Seventh Circuits, while being accepted in one form or another by the Second, Fifth, Sixth and Ninth Circuits.

The death-knell doctrine was rejected by the Seventh Circuit in *King v. Kansas City Southern Industries, Inc.*, 479 F.2d 1259 (7th Cir. 1973) where it was held that an order determining that an action could not proceed as a class action was not a final order and could not be appealed under § 1291. In its subsequent *en banc* decision in *Anschul v. Sitmar Cruises, Inc.*, 544 F.2d 1364 (7th Cir.), *cert. denied*, — U.S. — (1976), the Court adhered to its rejection of the death-knell doctrine.

The Third Circuit took the same view in *Hackett v. General Host Corp.*, 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972) even though the value of the individual plaintiff's claim was only $9.00. The court thereafter also reaffirmed its position *en banc* in *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974).

The death-knell theory had its origins in *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). But even the Second Circuit has harbored subsequent misgivings about the wisdom and propriety of the doctrine. In fact, in *Parkinson v. April Industries, Inc.*, 520 F.2d 650, 660 (2d Cir. 1975), Judge Friendly concluded that the doctrine was ill-conceived and called for its abolition.

Further confusion is engendered by the fact that the doctrine is not uniformly applied by those Circuits that have adopted it. For example, the Ninth Circuit does not permit an appeal under § 1291 from an order denying class-action status if *any* member of the class has an individually viable claim. *Hooley v. Red Carpet Corp. of America*, 549 F.2d 643 (9th Cir. 1977); *Share v. Air Properties G, Inc.*, 538 F.2d 279 (9th Cir.), *cert. denied sub nom. Woodruff v. Air Properties G, Inc.*, — U.S. — (1976). The court in *Hooley, l.c.* 645, analyzed the rationale of the death-knell doctrine and refused to employ the simplistic approach adopted by the Eighth Circuit here:

> *"The death knell doctrine is not designed to facilitate immediate review of refusals to certify an action as a class action. It is to make certain that the refusal to certify does not deprive the members of the purported class of an opportunity for review in due course of the refusal on appeal.* All opportunity for such review is destroyed if the refusal will have the practical effect of terminating all effort by anyone to assert the particular cause of action involved and to preserve for review on appeal the allegedly erroneous refusal to certify. *To determine whether such destruction has occurred requires an examination not limited to named plaintiffs."* (Emphasis added.)[3]

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[3] The Fifth Circuit's version of the doctrine was announced in *Gosa v. Securities Investment Co.*, 449 F.2d 1330 (5th Cir. 1971).

The Eighth Circuit in the instant case focused solely, and myopically, on the claims of the named representatives of the proposed class and ignored the existence of several other sizeable claims. The anomalous effect of the Eighth Circuit's rule, of course, is to encourage litigation by those who have the least at stake.

This Court has recently reiterated the well established principle that ". . . there has been a firm congressional policy against interlocutory or 'piecemeal' appeals and courts have consistently given effect to that policy. Finality of judgment has been required as a predicate for federal appellate jurisdiction." *Abney v. United States*, 45 U.S.L.W. 4954, 4955 (June 9, 1977). Obviously the decision by the district judge in this case to decertify the class action was not a "final" judgment in the traditional sense of that term. The respondents still have their individual claim, which was clearly not *de minimis* and which was certainly viable if respondents desired to pursue it. The Court of Appeals, however, surmised that in all likelihood the respondents (or more probably their lawyer) would choose to abandon the case if the "*in terrorem*" prospects of a class action recovery or settlement were removed. Therefore, although the respondents had purposefully eschewed the Congressionally-created path to the Court of Appeals created by § 1292(b), the Eighth Circuit nonetheless entertained their appeal by branding the district court's order as "final" under § 1291. It is a source of mystery how an economic decision by litigants or their counsel can confer finality on an order that is patently interlocutory. It is precisely that kind of logic which has caused several Circuits to reject the death-knell theory and has recently prompted Judge Friendly to conclude in his concurring opinion in *Parkinson v. April Industries, Inc., supra* at 660 (2d Cir. 1975) that:

> ". . . the best solution is to hold that appeals from the grant or denial of class-action designation can be taken only under the procedure for interlocutory appeals provided by 28 U.S.C. § 1292(b)."

Although it can be seriously questioned whether the death-knell doctrine is even a legitimate interpretation of § 1291, it is also of equal concern whether that doctrine, assuming its validity, represents the optimal—or even an acceptable—solution to the problem created by denial of class-action status under Rule 23. Because there are almost as many views of these problems as there are Circuits, and in light of the burgeoning caseloads already borne by our over-burdened federal courts, a rule which significantly expands the jurisdiction and the workloads of the Courts of Appeals should not be adopted without the imprimatur of this Court.

Even if we assume that the death-knell theory is an appropriate response to the situation presented by the instant case, its very application has implications which militate against its endorsement by this Court. One of the obvious problems, of course, is that the death-knell doctrine requires the appellate courts to make findings of fact on the issue of finality on a record which simply does not address that issue. Among the other shortcomings of the death-knell rule is the fact that it is not even-handed in its application because it is available to plaintiffs but never to defendants. Moreover, since a ruling adverse to a class-action plaintiff is immediately appealable, whereas an order granting a class-action status is not, it is not unreasonable to anticipate that these considerations may very well create a systemic bias in favor of plaintiffs in class-action determinations. Any factors which would tend to increase the number of class actions in the federal system, particularly for reasons extraneous to the purposes of Rule 23, would only serve to heighten "the concern expressed for the danger of vexatious litigation which could result from a widely expanded class of plaintiffs under Rule 10b-5." *Blue Chip Stamps v. Manor Drug Stores*, 421

U.S. 723, 740 (1975) as quoted in *Santa Fe Industries, Inc. v. Green*, — U.S. —, 45 U.S.L.W. 4317, 4322 (1977).

The death-knell theory is an unwarranted and inept vehicle for circumventing the machinery provided by Congress in §§ 1291 and 1292(b). The sharp conflict among the Circuits is ripe for review, and the problems created by the death-knell doctrine call for resolution by this Court.

II. The Court of Appeals Has Unjustifiably Interfered With the District Court's Class Action Determination.

In addition to the important jurisdictional question presented by the Eighth Circuit's adoption of the death-knell theory, this case also poses the issue explicitly left unresolved in this Court's recent opinion in *East Texas Motor Freight System, Inc. v. Rodriquez*, 45 U.S.L.W. 4524 (May 31, 1977), where the Court said:

> ". . . we do not reach the question whether a Court of Appeals should ever certify a class in the first instance."

In the case at bar, the district court originally certified the case for class-action treatment in June of 1975. At the same time, however, the district court, puzzled by the respondents' failure to join the underwriters as defendants and apprised of the fact that respondents' then-counsel regularly represented one of the underwriters, directed counsel to show cause why he should not be enjoined from representing the class. Counsel chose not to contest the matter and promptly withdrew from the action.

When respondents' new counsel appeared, the district court asked them to make a determination as to the advisability of naming the underwriters as defendants in the lawsuit. Respondents apparently reached the conclusion, however, that the statute of limitations had expired on all claims against the underwriters

during the period in which they had suppressed the conflict-of-interests problems of their first attorney. When the court realized that respondents' conduct may have seriously impaired the rights of their fellow class members, it expressed serious reservations about respondents' ability to fairly protect the interests of the class and ordered the parties to notify class members that, if they felt it necessary to protect their interest, they could either petition for an appointment of a new class representative or intervene in the action. While pressing for discovery on the merits, respondents delayed for many months in commencing discovery of the names and addresses of the class members and engaged in a procedural squabble about the form of notice to be given to the class. This resulted in considerable delay in sending the notice to the class members. Finally, exasperated by respondents' behavior and convinced of their inability to lead the class, the district court de-certified the class on September 1, 1976.

The Court of Appeals, after first announcing its new jurisdictional rule, summarily swept aside the district court's de-certification order and, in effect, re-certified the class. The advisability of that ruling, made on the basis of a cold record, as distinguished from the district court's years of living with this case, is questionable at best and evinces a growing disregard for the adjudicatory scheme embodied in Rule 23.

Rule 23 itself recognizes the existence of substantial discretion in the trial court with regard to class action matters and provides that class action determinations may be conditional. Unfortunately, however, steadily increasing encroachment by appellate courts threatens to subvert the purpose of the Rule. This is particularly disturbing in Securities Act cases such as this, for the Court of Appeals, without even considering whether the original certification of the class was appropriate or whether, for example, the class action would be "manageable," has simply substituted its view for that of the district court and has re-cer-

tified the class. Hence, petitioner has summarily been subjected, *inter alia*, to extensive and wide-ranging discovery on the merits in a class-action context, thus creating the problems about which this Court voiced apprehension in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975)

> ". . . [T]o the extent that [the discovery process] permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit. Yet to broadly expand the class of plaintiffs who may sue under Rule 10b-5 would appear to encourage the least appealing aspect of the use of the discovery rules."

In the *East Texas Motor Freight* case, the Court restored some of the equilibrium provided by Rule 23. But the action of the Court of Appeals in the instant case constitutes an unwarranted interference with the district court's functions under Rule 23. Accordingly, this Court should grant review to further reinforce the discretion vested in the district courts in class action matters.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the opinion and judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the United States District Court for the
Eastern District of Missouri
Eastern Division

Cecil and Dorothy Livesay,
Plaintiffs,
v.
Punta Gorda Isles, Inc., et al.,
Defendants.
No. 73 C 517 (3)

Order

(Filed September 1, 1976)

In accordance with the Memorandum of this Court filed this date and incorporated herein,

IT IS HEREBY ORDERED that the motion of the various defendants to decertify this case as a class action be and is GRANTED; and

IT IS FURTHER ORDERED that this action be and is decertified as a class action; and

IT IS FURTHER ORDERED that this matter shall proceed to trial only upon the individual claims of Cecil and Dorothy Livesay; and

IT IS FURTHER ORDERED that this action shall be set for trial at a later date; and

IT IS FURTHER ORDERED that all restrictions on discovery shall be lifted, and that discovery with regards to the individual claims of Cecil and Dorothy Livesay shall proceed in a normal fashion.

Dated this 1st day of September, 1976.

/s/ H. KENNETH WANGELIN
United States District Judge

Memorandum

(Filed September 1, 1976)

This matter is before the Court upon the motion of the various defendants to decertify this lawsuit as a class action.

The basis of the various defendants' motion is that the plaintiffs, as class representatives, are failing to prosecute this action, and are therefore denying the defendants a right to a speedy adjudication of the claims against them.

In order to deal with the defendants' motion, a brief chronology of events is required. This lawsuit was originally filed on July 27, 1973. Plaintiffs' original counsel did not seek a class action hearing until April 9, 1974. On June 19, 1975, this Court, in a Memorandum and Order, declared that the action should proceed as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. The delay between the class action hearing, and this Court's certification was due to the substitution of new counsel for plaintiffs. On October 23, 1975, this Court partially dissolved its stay order regarding discovery, and allowed discovery to proceed as to the names and addresses of the members of the class so that the appropriate class action notice could be sent. The plaintiffs did not institute discovery

to determine the names and addresses of the absent class members until July 20, 1976.

It is the opinion of the Court that the plaintiffs have failed to offer adequate excuses for their delay in prosecuting this action as a class action. In response to the motion of the defendants, the plaintiffs have alleged that it is anomalous for the defendants to attempt to protect the interests of the members of the class. The Court agrees that such concern on the part of the defendants involves tears of the crocodilian variety, however, the plaintiffs misjudged the true thrust of the defendants' motion. The defendants are merely seeking, as is their right, to have a speedy adjudication of the claims against them. Since this lawsuit has been pending for approximately three years, and class action notices have not gone out more than a year after the action was certified as a class action, the Court is forced to the conclusion that there has been a lack of prosecution on the part of the plaintiffs as class representatives.

Since the plaintiffs seem to have no desire to prosecute this matter as a class action, the Court will decertify this matter as a class action, and the lawsuit shall proceed on the individual claims of Cecil and Dorothy Livesay as stated in the accompanying Order.

Dated this 1st day of September, 1976.

/s/ H. KENNETH WANGELIN
United States District Judge

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 76-1881

Cecil Livesay and Dorothy Livesay, for Themselves and on Behalf of All Others Similarly Situated,
Plaintiffs-Appellants,

v.

Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., John W. Douglas, D.D.S., Coopers & Lybrand (Formerly Lybrand, Ross Bros. & Montgomery),
Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Missouri

No. 76-1906

Cecil Livesay and Dorothy Livesay, for Themselves and on Behalf of All Others Similarly Situated,
Petitioners,

v.

Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., John

W. Douglas, D.D.S., Coopers & Lybrand (Formerly Lybrand, Ross Bros. & Montgomery),

and

Honorable H. Kenneth Wangelin, United States District Judge,
Respondents.

Petition for Writ of Mandamus

Submitted: January 13, 1977

Filed: March 4, 1977

Before HEANEY and STEPHENSON, Circuit Judges, and STUART,* District Judge.

STEPHENSON, Circuit Judge.

In these consolidated cases, Cecil and Dorothy Livesay (plaintiffs) seek review of the district court's order decertifying their action as a class action. In No. 76-1881, plaintiffs appeal from that order. In No. 76-1906, plaintiffs seek a writ of mandamus compelling the district court to vacate its decertification order.

On July 27, 1973, plaintiffs filed a complaint seeking approximately $2650 in individual damages resulting from their purchase of $5000 worth of debentures and 100 shares of common stock issued by Punta Gorda Isles, Inc. (Punta Gorda), a Florida land development corporation, pursuant to a registration statement and prospectus dated May 2, 1972. The essence of plaintiffs' claim was that the prospectus and registration statement contained materially misleading statements and omissions.[1] The

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* The Honorable William C. Stuart, United States District Judge for the Southern District of Iowa, sitting by designation.

[1] Essentially, the complaint alleges: (1) a failure to disclose that new accounting rules of the American Institute of Certified Public

named defendants were Punta Gorda, certain individuals who were officers and directors of Punta Gorda, and the accounting firm of Coopers & Lybrand (Coopers), which had certified the financial statements in the registration statement and prospectus. Plaintiffs sought to represent a class of approximately 1,800 persons who had purchased securities at the May 2, 1972, public offering.

On April 9, 1974, plaintiffs moved pursuant to Fed. R. Civ. P. 23 to have the action certified as a class action. On May 13, 1974, the district court granted Coopers' motion for a stay of all discovery except discovery relating to the class action determination. On June 24, 1974, oral argument on the class action certification motion was held. On July 16, 1974, the district court denied Coopers' motion to strike the class action allegations in the complaint, but did not at that time certify the class. On September 23, 1974, the district court denied plaintiffs' motion to lift the stay on substantive discovery.

On November 1, 1974, plaintiffs filed a petition for a writ of mandamus in this court, requesting that the district court be ordered to lift the stay on substantive discovery. This court denied the petition by order dated November 15, 1974, but expressed the view that plaintiffs should request a prompt ruling on their motion for class action certification and that the district court should promptly rule on the motion and thereafter permit discovery on the merits. *Livesay v. Punta Gorda Isles, Inc.*, No. 74-1827 (8th Cir., November 15, 1974).

Accountants would require an adverse restatement of earnings for 1967-1972; (2) a failure to disclose that the earnings consisted of installment sale contracts where cash would not be received until future dates; (3) a misleading statement of the ratio of earnings to fixed charges because not based on actual cash flow; and (4) a failure to disclose that certain Florida ecological regulations would seriously impede Punta Gorda from developing artificial waterfront property.

On December 30, 1974, an evidentiary hearing on the class action certification motion was held in the district court. On June 19, 1975, the district court entered an order certifying the action as a Rule 23(b)(3) class action, which order expressly found plaintiffs to be adequate class representatives. The order also held that plaintiffs' counsel had a conflict of interest because he had represented one of the underwriters of the Punta Gorda offering on unrelated matters. The order deemed this conflict serious because none of the underwriters had been joined as defendants in the plaintiffs' suit. Plaintiffs' counsel withdrew, and on June 30, 1975, plaintiffs' current counsel entered its appearance.

On July 25, 1975, plaintiffs moved to dissolve the stay on substantive discovery. Coopers opposed the motion and sought a reconsideration of the order certifying the action as a class action. On October 23, 1975, the district court denied plaintiffs' motion to dissolve the stay. In its order, the district court expressed concern about the adequacy of plaintiffs as class representatives, based largely on plaintiffs' failure to join any underwriters as defendants. The court did not, however, decertify the class action at that time, because it believed that such decertification might jeopardize the claims of absent class members. The court directed the parties to prepare forms of notice of the pendency of the class action to be mailed to the class members and also lifted the stay on discovery to the extent that plaintiffs could seek the names and addresses of the class members. The parties submitted proposed forms of notice in November 1975.

On March 1, 1976, the district court mailed to the parties its proposed form of notice. Both parties submitted suggested changes, and on April 9, 1976, the district court mailed to the parties the final form of notice.

On April 20, 1976, plaintiffs' counsel telephoned counsel for Punta Gorda and requested the names and addresses of the

initial registered owners (after the underwriters) of the debentures and common stock sold pursuant to the May 2, 1972, registration statement. By letter dated April 21, 1976, Punta Gorda's counsel declined to furnish that information.

On July 9, 1976, plaintiffs requested the district court to conduct a conference for the purpose of discussing the issues involved in discovery of the names of class members. On July 20, 1976, plaintiffs served defendants with a motion to produce the names and addresses of the initial registered owners of the stock and debentures. On July 23, 1976, Coopers filed a motion to decertify the action as a class action. On July 26, 1976, the conference requested by plaintiffs was held at which the district court ordered the parties to submit briefs, etc. in support of the various pending motions.

On September 1, 1976, the district court issued a memorandum and order decertifying the class action. The court found that plaintiffs had inordinately delayed in prosecuting the case and were thus not adequate class representatives. The order also lifted the stay on substantive discovery. Subsequently, both parties have engaged in some discovery on the merits. Plaintiffs now seek review of the September 1 decertification order by direct appeal (No. 76-1881) and by a petition for a writ of mandamus (No. 76-1906).

We are confronted with the threshold issue of our jurisdiction to hear an appeal from the district court's order decertifying the lawsuit as a class action. Defendants allege that the order is not a final order which is appealable under 28 U.S.C. § 1291. We disagree.

Orders denying class action certification are reviewable under 28 U.S.C. § 1291 if they sound the "death knell" of the action. *See, e.g., Share v. Air Properties G. Inc.*, 538 F.2d 279, 282 (9th Cir.), *cert. denied sub nom., Woodruff v. Air Properties*

G. Inc., 97 S.Ct. 321 (1976); *Ott v. Speedwriting Pub. Co.*, 518 F.2d 1143, 1146-49 (6th Cir. 1975); *Williams v. Mumford*, 511 F.2d 363, 366 (D.C. Cir.), *cert. denied*, 423 U.S. 828 (1975); *Shayne v. Madison Square Garden Corp.*, 491 F.2d 397, 399-401 (2d Cir. 1974); *Graci v. United States*, 472 F.2d 124, 126 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973); *Eisen v. Carlisle & Jacquelin* (*Eisen I*), 370 F.2d 119, 120-21 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). *See also Hartmann v. Scott*, 488 F.2d 1215, 1220 (8th Cir. 1973); *compare, In re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213 (8th Cir.), *cert. denied*, 423 U.S. 947, *rehearing denied*, 423 U.S. 1039 (1975). *Contra, King v. Kansas City Southern Industries*, 479 F.2d 1259, 1260 (7th Cir. 1973); *Hackett v. General Host Co.*, 455 F.2d 618, 621-26 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972).

To determine whether a decertification order sounds the "death knell" of the action, we begin by examining the amount of the class representatives' individual claim.[2] Plaintiffs' individual claim for damages totals approximately $2,650. Because this claim falls between those cases where the individual claim is clearly not viable[3] and those cases where the individual claim

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[2] Defendants allege that because the record reveals other members of the purported class who have substantial individual claims, the "death knell" doctrine should not apply. That was the result reached in *Share v. Air Properties G. Inc., supra*, 538 F.2d at 283. We do not consider the soundness of that holding, however, because the case is distinguishable on its facts. In *Share* the court referred to class members who were "actively engaged" in the litigation. Here the record reveals only that certain class members had indicated willingness to pay part of the expenses of suit, and even that tangential involvement ceased after the appearance of plaintiffs' counsel.

[3] *See, e.g., Ott v. Speedwriting Pub. Co., supra* ($30); *Korn v. Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971) ($386); *Green v. Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969) ("less than $1000"); *Eisen v. Carlisle & Jacquelin, supra* ($70).

is viable,[4] we must examine the amount of plaintiffs' claim in relation to their financial resources and the probable cost and complexity of the lawsuit. *See, e.g., Share v. Air Properties G. Inc., supra,* 538 F.2d at 282; *Graci v. United States, supra,* 472 F.2d at 126; *Korn v. Franchard Corp.,* 443 F.2d 1301, 1307 (2d Cir. 1971).

Plaintiffs, both of whom are employed, have an aggregate yearly gross income of $26,000. Their total net worth is approximately $75,000, but only $4,000 of this sum is in cash. The remainder consists of equity in their home and investments.

As of December 1974 plaintiffs had already incurred expenses in excess of $1,200 in connection with this lawsuit. Plaintiffs' new counsel has estimated expenses of this lawsuit to be $15,000. The nature of this case will require extensive discovery, much of which must take place in Florida, where most defendants reside. Moreover, the allegations regarding the prospectus and financial statements will likely require expert testimony at trial.

After considering all the relevant information in the record, we are convinced that plaintiffs have sustained their burden[5]

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[4] *See, e.g., Shayne v. Madison Square Garden Corp., supra* ($7,482); *Falk v. Dempsey-Tegeler & Co.,* 472 F.2d 142 (9th Cir. 1972) ($14,125); *Milberg v. Western Pac. R.R.,* 443 F.2d 1301 (2d Cir. 1971) ($8,500).

[5] Plaintiffs who seek to invoke the "death knell" doctrine have the burden of developing, in the trial court, an adequate factual record upon which an appellate court may determine whether the action will proceed absent class certification. *Share v. Air Properties G. Inc., supra,* 538 F.2d at 282; *Gosa v. Securities Investment Co.,* 449 F.2d 1330 (5th Cir. 1971). As the *Gosa* court indicated, the preferable way to do this is in a post-ruling hearing where the district court has the opportunity to enter appropriate findings of fact. No such hearing was held in the instant case. However, we do not read *Gosa* as requiring such a hearing in all cases. In the instant case, the record of the entire proceeding contains sufficient facts to allow us to make an informed judgment on the matter.

of showing that they will not pursue their individual claim if the decertification order stands. Although plaintiffs' total net worth could absorb the cost of this litigation, "it [takes] no great understanding of the mysteries of high finance to make obvious the futility of spending a thousand dollars to get a thousand dollars—or even less." Douglas, *Protective Committees in Railroad Reorganizations,* 47 Harv. L. Rev. 565, 567 (1934). We conclude we have jurisdiction to hear the appeal.

The district court has wide latitude in determining whether an action may be maintained as a class action. If the court applies the proper criteria in making this determination, its decision is reviewable only for an abuse of discretion. *Wright v. Stone Container Corp.,* 524 F.2d 1058, 1061 (8th Cir. 1975); *Shumate v. Nat'l Ass'n of Securities Dealers,* 509 F.2d 147, 155 (5th Cir.), *cert. denied,* 423 U.S. 868 (1975); *Kamm v. California City Development Co.,* 509 F.2d 205, 210 (9th Cir. 1975); *Wetzel v. Liberty Mutual Ins. Co.,* 508 F.2d 239, 245 (3d Cir.), *cert. denied,* 421 U.S. 1011 (1975); *City of New York v. Int'l Pipe & Ceramics Corp.,* 410 F.2d 295, 298 (2d Cir. 1969).

Because the decertification order in this case was predicated solely on the finding that plaintiffs were not adequate class representatives because they had inordinately delayed in prosecuting the litigation,[6] the sole issue[7] on this appeal may be

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[6] As plaintiffs correctly point out, the decertification order was phrased in terms of a denial of defendants' rights to a speedy adjudication of claims against them. This factor is not a proper criterion to consider in determining whether plaintiffs will adequately represent the members of the class. However, a review of the entire record convinces us that the district court was concerned with plaintiffs' failure to prosecute the case as it related to their adequacy as class representatives.

[7] Plaintiffs also seek to raise the following issues: (1) that the decertification order was erroneously predicated on plaintiffs' failure to join underwriters as defendants; (2) that the district court ex-

simply stated: was the district court's decertification order finding plaintiffs to be inadequate class representatives so erroneous as to constitute an abuse of discretion? We answer the question in the affirmative, and we reverse.

The decertification order was apparently based upon three distinct periods of delay. The first period of delay was approximately eight months from the date of filing the complaint until the plaintiffs moved to have the action certified as a class action. The record indicates that this period of time was largely devoted to preparing and amending pleadings and engaging in discovery. We note that plaintiffs filed their motion to certify shortly after defendants filed their last responses to plaintiffs' interrogatories. In these circumstances, we find little to support a finding that plaintiffs were dilatory in moving for class action certification. Furthermore, the general rule is that a delay prior to moving for class action certification is not a basis for refusing certification absent some showing of prejudice. *See, e.g., Bernstein v. National Liberty Int'l Corp.*, 407 F. Supp. 709, 714 (E.D. Pa. 1976); *Souza v. Scalone*, 64 F.R.D. 654, 656 (N.D. Cal. 1974); *Boring v. Medusa Portland Cement Co.*, 63 F.R.D. 78, 80 (M.D. Pa.), *appeal dismissed without opinion*, 505 F.2d 729 (3d Cir. 1974); *Feder v. Harrington*, 52 F.R.D. 178, 181-82 (S.D.N.Y. 1970); *Epstein v. Weiss*, 50 F.R.D. 387, 392 (E.D. La. 1970). No showing of prejudice was made here.

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hibited a lack of fair and impartial judicial procedure; (3) that the district court ordered plaintiffs to follow class action procedures which violate the federal rules; and (4) that the district court violated this court's mandate by not promptly lifting the stay on substantive discovery after certifying the class. The first two claims are devoid of factual support in the record. The third claim is relevant to the decertification order only insofar as it alleges that the class action procedures authorized by the district court impeded the progress of the litigation. As such, it merely restates the allegation that the delay was not caused by plaintiffs. The final claim is moot because the decertification order lifted the stay on substantive discovery. Moreover, as with the third claim, its only relevance to the decertification order is the allegation that the stay of discovery was a contributing cause of the delay.

The second time period referred to in the decertification order was the 14 month period between the motion for class action certification and the order certifying the class. The district court's decertification order attributed this delay to the appointment of new counsel for plaintiffs. However, it should be noted that new counsel for plaintiffs did not appear until *after* the order certifying the class was entered.

The defendants' only colorable allegation of delay during this second period is that plaintiffs were dilatory in moving for an evidentiary hearing on the class action motion. The record discloses that the district court indicated during oral argument that an evidentiary hearing should be held if the court decided that the issue of individual reliance did not bar maintaining the suit as a class action. This decision was reached on July 16, 1975, and plaintiffs did not seek an evidentiary hearing until September 20, 1975, a period of nine weeks. During this nine-week period plaintiffs were not inactive. They moved to enjoin the destruction of documents and also moved to lift the stay on substantive discovery. We cannot say, and the district court did not find, that pursuing these avenues was a sign of inaction, negligence, or a failure adequately to protect the interests of other class members.

The third period of time mentioned in the decertification order is the period from the district court order allowing discovery of the names and addresses of class members until plaintiffs first sought to discover that information.[*] This period runs

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[*] A persuasive argument can be made that this is the only period of delay upon which the decertification order could properly be predicated. Because the first two periods of delay occurred prior to the certification order, defendants could have raised the issue of failure to prosecute at that time, but did not. They may now be foreclosed from raising the issue based on these delays. *Kramer v. Scientific Control Corp.*, 67 F.R.D. 98, 99 (E.D. Pa. 1975), *rev'd in part on other grounds*, 534 F.2d 1085 (3d Cir.), *cert. denied sub nom., Arthur Andersen & Co. v. Kramer*, 97 S.Ct. 90 (1976). *Cf. In re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213, 215 (8th Cir.), *cert. denied*, 423 U.S. 947, *rehearing denied*, 423 U.S. 1039 (1975).

from October 23, 1975, to April 20, 1976, when plaintiffs first requested Punta Gorda's counsel to furnish the names and addresses of the initial registered owners of the securities. Defendants contend that because plaintiffs have offered no compelling excuse for failing to request this information more promptly, this delay *ipso facto* justified the district court's finding that plaintiffs are inadequate representatives. We disagree.

We begin by noting that there has been no showing that plaintiffs' failure to request production of this information at an earlier date has prejudiced the class members. The notices to the class members could not have gone out until the final form of notice was approved by the court, which did not occur until April 9, 1976. Eleven days later, plaintiffs' attorney telephoned counsel for Punta Gorda and requested that Punta Gorda furnish the names and addresses of the initial registered owners of the securities in question. In a letter dated August 4, 1975, counsel for Punta Gorda had agreed to furnish this information. However, in response to the telephone call, counsel for Punta Gorda wrote a letter to plaintiffs' counsel refusing to furnish this information.[9] In these circumstances we cannot agree that plaintiffs were dilatory in seeking the names and addresses of potential class members. They had every right to expect that defendants would promptly furnish this information. To hold that plaintiffs are inadequate class representatives because they failed to anticipate defendants' eventual objections to discovery would be tantamount to saying that class representatives must be gifted with prescience. This we decline to do.

That there has been undue delay in this lawsuit is beyond question. From examination of the entire record of this protracted proceeding, however, it becomes quite clear that much of the delay in this case is directly attributable to defendants. For example, defendants have been granted 14 extensions of time, totalling approximately 190 days, in which to file pleadings, motions and other papers. In addition, defendants have filed motions to reconsider or modify earlier court orders, which motions have consistently alleged grounds previously ruled upon by the court. The clear import of this course of conduct is to make this lawsuit as time-consuming and costly as possible.

[9] This refusal was later formalized in objections to plaintiffs' motion to produce. One of the objections to this motion was that the requested information was not in the possession of Punta Gorda, but in the possession of Punta Gorda's transfer agent. Because the transfer agent could only release this information at the direction of Punta Gorda, we find this objection little else than a delaying tactic.

In addition, the district court has on some occasions taken action which did not advance the progress of this litigation. The court took approximately five months to decide the class action certification motion after the evidentiary hearing was held. The court took approximately four months to approve the form of notice to the class members. These delays appear to have been justifiable due to the complex nature of the questions presented. However, during this time there was a stay of substantive discovery in effect. The practical effect of this stay was to prevent the parties from concurrently proceeding to the merits while the court considered the various procedural questions. In these circumstances, virtually all the plaintiffs could do to advance the course of this litigation was to attempt to lift the stay on discovery. Plaintiffs twice sought to lift this stay and were twice unsuccessful.

We conclude that the district court order decertifying the action as a class action because of plaintiffs' failure to prosecute is wholly unsupported by the record, and we accordingly reverse. We do not disturb that portion of the order which lifted the stay on substantive discovery.

The record in this case compels us to make certain further comments. We are dismayed at the utter lack of cooperation between opposing counsel. The record is replete with instances

where relatively minor procedural matters have mushroomed into full-scale confrontations, with the concomitant avalanche of briefs, memoranda, etc. By and large, these matters could, and should, have been settled informally by the parties or, if necessary, in conference with the district court.

Even more disturbing is the tone with which these proceedings have been conducted. All too often the parties have engaged in personal attacks on opposing counsel and the district court. These baseless allegations are not a substitute for advocacy based on the facts and the law and they have no place in our judicial system.

On remand, we anticipate that this conduct will not reoccur. If it does, the district court will be forced to take a more active role in managing this case to insure that it progresses as expeditiously as possible consistent with fairness to the parties. *See Manual for Complex Litigation* § 1.10 (1973).

In No. 76-1881, the order of the district court is reversed and the cause remanded for further proceedings consistent herewith. In No. 76-1906, the petition for writ of mandamus is dismissed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

United States Court of Appeals
for the Eighth Circuit

No. 76-1881 September Term, 1976

Cecil Livesay and Dorothy Livesay, for themselves and on behalf of all others similarly situated,

Appellants,

vs.

Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., John W. Douglas, D.D.S., Coopers & Lybrand (formerly Lybrand, Ross Bros. & Montgomery),

Appellees.

JUDGMENT

(Filed March 4, 1977)

Appeal From the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed.

And it is further ordered by this Court that this cause be and is hereby remanded to the said District Court for proceedings consistent with the opinion of this Court.

March 4, 1977

A true copy

Attest: /s/ Robert C. Tucker

Clerk, U. S. Court of Appeals, 8th Circuit

APPENDIX C

United States Court of Appeals
for the Eighth Circuit

76-1881 September Term, 1976

Cecil Livesay, et al., etc., Appellants,
vs.
Punta Gorda Isles, Inc., et al., Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

The Court having considered petitions for rehearing en banc filed by counsel for appellees and, being fully advised in the premises, it is ordered that the petitions for rehearing en banc be, and they are hereby, denied.

Considering the petitions for rehearing en banc as petitions for rehearing, it is ordered that the petitions for rehearing also be, and they are hereby, denied.

March 28, 1977